

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY R. CRABTREE

Claimant

VS.

CORNEJO & SONS

Respondent

AND

INSURANCE COMPANY OF NORTH AMERICA

Insurance Carrier

Docket No. 154,954

ORDER

ON the 23rd day of June, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl dated April 22, 1994, came on before the Appeals Board for oral argument.

APPEARANCES

Claimant appeared by and through his attorney James B. Zongker of Wichita, Kansas. Respondent and insurance carrier appeared by and through their attorney Jeffrey R. Brewer of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge found that claimant was entitled to permanent partial general disability benefits based upon a forty-four percent (44%) work disability. The

respondent and insurance carrier request the Appeals Board to review that finding. Nature and extent of disability is the sole issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

The Award of the Administrative Law Judge is modified in the respect that claimant is entitled to permanent partial general disability benefits based upon a fifty-six percent (56%) work disability.

Claimant is 23-years old, a high school graduate, and former supply clerk in the United States Navy. Claimant has work experience in sheetmetal assembly, fast food, and construction. Claimant's former jobs primarily involved manual labor that entailed physical activities of lifting, squatting, kneeling, twisting and bending.

Claimant commenced work as a manual laborer for Cornejo and Sons on April 3, 1991. Claimant was hired in at \$6.68 per hour for 40 hours per week. Claimant's job as a laborer required him to repetitively bend, lift, squat, walk and twist. He lifted up to 100 pounds. After working approximately six hours, claimant was run over by a forklift. The forklift ran over claimant's left leg, pelvic area, and low back, causing multiple fractures to the left leg.

Claimant was treated by Wichita orthopedic surgeon Bernard T. Poole, M.D. Dr. Poole diagnosed claimant as having a comminuted fracture of the left femoral shaft. Dr. Poole performed an open reduction and internal fixation and bone graft to the extensive fracture. Claimant was progressing well post-operatively until June 28, 1991, when he fell in his back yard and broke the hardware in his leg. The claimant required additional surgery on July 2, 1991, when Dr. Poole performed further open reduction, internal fixation and bone grafting.

At claimant's last visit with Dr. Poole, the doctor found the fractures to be well-consolidated and that claimant had excellent range of motion in the hip and knee. Dr. Poole believes that claimant will need future medical treatment in one or two stages to remove the hardware from his leg. Dr. Poole is unwilling to provide an impairment of function rating until claimant's hardware is removed. Dr. Poole believes that claimant should restrict his running and jumping and lift no greater than 100 pounds.

Claimant was initially released by Dr. Poole to return to work with restrictions, one of which was a restriction not to lift greater than 10 pounds. The claimant worked for approximately three hours on September 23, 1992, and was assigned to the storeroom to mark serial numbers on tools and equipment. The 10 pound weight restriction made it impossible for claimant to perform his job without assistance. Claimant became frustrated because he had to ask co-workers who were working other jobs to assist him. As a result claimant left the premises and did not return.

The respondent and insurance carrier referred claimant to Steven J. Howell, M.D., for an independent medical evaluation. Dr. Howell's examination revealed that claimant had limited range of motion in the left knee and hip, the existence of a slight Trendelenburg limp, and loss of range of motion in the back of approximately 10 degrees. Dr. Howell found that the left leg was shorter than the right leg by one centimeter. Using the AMA Guides, Dr. Howell believes that claimant has a three percent (3%) permanent impairment

of function to his back as a result of the loss of range of motion. Dr. Howell believes that claimant has a ten percent (10%) impairment of function to the leg should there be union in the femur, or a forty-seven percent (47%) impairment of function to the leg if there is non-union. Depending upon whether union or non-union exists, Dr. Howell believes that claimant has either a ten percent (10%) or twenty-two percent (22%) permanent partial impairment of function to the body as a whole. Dr. Howell believes claimant should observe the permanent restrictions and limitations of no kneeling, squatting, running, or climbing; no repetitive bending; no lifting greater than 35 pounds nor carrying greater than 20 pounds. Also, claimant should walk short distances only, and limit his standing or walking to a maximum of four hours per day. The four hours should be dispersed throughout the day.

At his attorney's request, claimant was evaluated by Ernest R. Schlachter, M.D., on November 2, 1992. Dr. Schlachter diagnosed the claimant as having chronic lumbosacral sprain and residual weakness of the left leg as a result of multiple fractures to the left femur. Dr. Schlachter believes claimant has a five percent (5%) permanent impairment of function due to the lumbosacral sprain, and that claimant's limp causes an abnormal stress on the back. He believes that claimant has a thirty percent (30%) permanent impairment of function to the left lower extremity as a result of his injuries. These values combine for a sixteen percent (16%) permanent impairment of function to the body as a whole. Dr. Schlachter believes claimant should be on permanent restrictions and limitations of no kneeling, squatting, running, or climbing; no repetitive bending, no lifting over 35 pounds nor carrying greater than 20 pounds. Additionally, claimant should not walk greater than one mile per day in an eight hour day and limit his walking to short distances, nor attempt a job moving any kind of equipment.

Claimant was evaluated by labor market expert Jerry D. Hardin on February 8, 1993. Mr. Hardin is a human resource/personnel consultant with twenty-three years of experience. Mr. Hardin consults in workers compensation cases to evaluate an injured worker's ability to obtain and retain employment in the open labor market. Utilizing the restrictions of Dr. Schlachter, Mr. Hardin believes claimant has lost eight-five to ninety percent (85-90%) of his ability to perform work in the open labor market and twenty-five percent (25%) of his ability to earn a comparable wage. Mr. Hardin believes claimant retains the ability to earn approximately \$200.00 per week. Mr. Hardin believes that claimant is primarily limited to sedentary and some light duty work.

The Appeals Board finds that claimant is unable to return to one of his former occupations with Cessna Aircraft of sheetmetal assembler. Although Mr. Hardin testified that claimant could perform that job without violating his lifting restrictions, his restrictions pertaining to kneeling, squatting, and bending eliminate that position. Also, sheetmetal work violates Dr. Howell's restrictions against standing or walking more than four hours per day. Therefore, respondent's argument that claimant retains the ability to earn a comparable wage by returning to sheetmetal work in the aircraft industry is without merit.

Based upon the above, the Appeals Board finds that claimant has lost approximately eighty-seven and one-half percent (87.5%) of his ability to perform work in the open labor market and twenty-five percent (25%) of his ability to earn a comparable wage. The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor greater weight than the other and accordingly they will be weighed equally. The result is an

average which results in a work disability of fifty-six percent (56%) which the Appeals Board considers to be an appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated April 22, 1994, should be, and hereby is, modified and that an award of compensation is entered in accordance with the above findings in favor of the claimant, Jerry R. Crabtree, and against the respondent, Cornejo and Sons, and its insurance carrier, Insurance Company of North America, for an accidental injury occurring on April 3, 1991. Based upon a stipulated average weekly wage of \$267.20 the claimant is entitled to 77 weeks temporary total disability at the rate of \$178.14 per week or \$13,716.78 followed by 338 weeks at \$99.76 per week or \$33,718.88 for a fifty-six percent (56%) percent permanent partial general body disability making a total award of \$47,435.66.

As of April 20, 1994, there would be due and owing to the claimant 77 weeks temporary total compensation at \$178.14 per week in the sum \$13,716.78 plus 82.14 weeks permanent partial compensation at \$99.76 per week in the sum of \$8,194.29 for a total due and owing of \$21,911.07 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$25,524.59 shall be paid at \$99.76 per week for 255.86 weeks or until further order of the Director.

The remaining orders of the Administrative Law Judge in the Award dated April 22, 1994, are affirmed and adopted by the Appeals Board as if fully set forth herein.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: James B. Zongker, PO Box 47370, Wichita, Kansas 67201-7370
Jeffrey R. Brewer, 300 W Douglas, Suite 500, Wichita, Kansas 67202-2909
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director